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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/579,352

04/09/2007

David John Judge

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EXAMINER

WILLIAMS, LELA

ART UNIT

PAPER NUMBER

1787

NOTIFICATION DATE

DELIVERY MODE

05/27/2010

ELECTRONIC

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

patentgroupus@unilever.com

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>	
	10/579,352	JUDGE ET AL.	
	<b>Examiner</b>	<b>Art Unit</b>	
	LELA S. WILLIAMS	1787	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) ☒ Responsive to communication(s) filed on 09 April 2007.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) ☒ Claim(s) 1-24 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-24 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 12 May 2006 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All    b) ☐ Some \*    c) ☐ None of:
1. ☒ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                       | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)   | Paper No(s)/Mail Date. _____                                      |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date <u>12/14/2007</u> .  | 6) <input type="checkbox"/> Other: _____                          |

## DETAILED ACTION

### *Claim Rejections - 35 USC § 112*

1. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

2. **Claims 1-24 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.**

**Claims 1-3 and 15-19**, states amounts in “weight by weight” which is indefinite given it is unclear if this is by weight of the freezing point depressants (gum in claim 15) or the total weight of the composition.

**Claims 1, 4, and 5** state the confection has “extensibility” and it is unclear to what this means. There is no clear definition in the specification.

**Claims 6 and 20** state “weight by weight monosaccharide, disaccharide, oligosaccharide and corn syrup” does this mean just the weight of monosaccharide or weight of monosaccharide, disaccharide, oligosaccharide and corn syrup?

**Claims 7 and 21** state “wherein the monosaccharide, disaccharide and corn syrup is selected from the group consisting of sucrose, dextrose, lactose, fructose, maltose, corn syrup”. It is unclear to which carbohydrate is being selected from the group. Also, concerning corn syrup, how is it in a group selected from corn syrup or other sugars given that “corn syrup” is produced from corn.

**Claims 8, 10, 15** state “an effective amount” which renders the claims indefinite given it is unclear to what the effective amount is.

***Claim Rejections - 35 USC § 102***

3. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

4. **Claims 1-7, 10-14 are rejected under 35 U.S.C. 102(b) as being anticipated by Malone et al. US Pub. No. 2003/0134024.**

**Regarding claims 1-7 and 10-14,** Malone discloses an frozen aerated confection comprising freezing point depressants in amounts of 25%-37% w/w [0017 & 0019], with a mean number average molecular weight of less than 300 and 230 [0021 & 0024]. Given that the reference discloses a frozen aerated confection within the same range of freezing point depressants and average molecular weight as that presently claimed, it is expected that the product would inherently possess all the same characteristics as the presently claimed confection, including having an extensibility of at least 30%, 40%, or 50% at -18°C. Malone also discloses “[t]he freezing point depressants are constituted at a level of at least 98% of mono, di, and oligosaccharides” and the use of fructose [0025] and corn syrup with a DE of 63 [0013 & 0039]. Malone further discloses the use of proteins, such as skimmed milk powder and whey [0031], in an amount effective to keep the confection from forming undesirable characteristics [0027]. The frozen aerated “confection has an overrun of less than 150%” [0028].

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***Claim Rejections - 35 USC § 103***

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

6. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

7. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

**8. Claims 8-11 & 15-24 are rejected under 35 U.S.C. 103(a) as being unpatentable over Malone et al. US Pub. No. 2003/0134024 in view of Daniel et al. GB 2357954.**

**Regarding claims 8-11**, Malone is applied as discussed above in paragraph 4 with regards to claim 1. Malone is silent to an amount of polysaccharide being present in the frozen

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aerated confection. Daniel discloses a frozen aerated confection containing an effective amount of polysaccharides such as xanthan gum and guar gum (page 8, lines 4-10) and “an effective amount of proteins such as milk protein, soya protein, whey protein and mixtures thereof” (page 8, lines 17-25). Given Daniels explicit disclosure of the use of effective amounts of polysaccharides and proteins used in making a frozen aerated confection, it would have been obvious to one of ordinary skill in the art to add an effective amount of polysaccharides and proteins, selected from milk protein, soya protein, whey protein and mixtures thereof, to obtain a frozen aerated confection with suitable extensibility and overrun (Daniel, abstract).

**Regarding claims 15-24,** Malone discloses an frozen aerated confection comprising freezing point depressants in amounts of 25%-37% w/w [0019], with a mean number average molecular weight of less than 300 and 230 [0021 & 0024] and an effective amount of proteins to keep the confection from forming undesirable characteristics [0027]. Malone also discloses “[t]he freezing point depressants are constituted at a level of at least 98% of mono, di, and oligosaccharides” and the use of fructose [0025] and corn syrup with a DE of 63 [0039] and the frozen aerated “confection has an overrun of less than 150%” [0028]. Malone is silent to an amount of polysaccharide being present in the frozen aerated confection. Daniel discloses a frozen aerated confection containing polysaccharides such as xanthan gum and guar gum (page 8, lines 4-10), the guar gum present in amounts of 0.4-0.9% (page 8, lines 29-34). Malone also discloses 1-5% of proteins selected from milk protein, soya protein, whey protein and mixtures thereof (page 8, lines 29-34). Given Daniels explicit disclosure of the use of effective amounts of polysaccharides and proteins used in making a frozen aerated confection, it would have been obvious to one of ordinary skill in the art to add an effective amount of polysaccharides and

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proteins, selected from milk protein, soya protein, whey protein and mixtures thereof, to obtain a frozen aerated confection with suitable extensibility and overrun (Daniel, abstract).

### ***Conclusion***

9. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Marshall et al "Ice Cream; Fifth Edition", US 2001/031304, US 3,949,102, US 4,434,186, US 4,452,824, and US 2003/003215 are all cumulative to the rejections of record.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to LELA S. WILLIAMS whose telephone number is (571)270-1126. The examiner can normally be reached on Monday to Thursday from 7:30am-5pm (EST).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Callie Shosho can be reached on 571-272-1123. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

LELA S. WILLIAMS  
Examiner, Art Unit 1787

/L. S. W. /

/Callie E. Shosho/  
Supervisory Patent Examiner, Art Unit 1787